4-1700-10650-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Brennan H.,

Complainant,

v.

ORDER ON MOTION FOR PARTIAL SUMMARY DISPOSITION

Old Mexico, Inc. and Margarita Murphy's of Woodbury, Inc. and Wayne Belisle and Mark Peterson individually,

Respondents.

This matter came on for hearing before Administrative Law Judge Bruce H. Johnson on July 21, 1997, on a Motion for Summary Disposition filed by the Respondents, Margarita Murphy's and Wayne Belisle. Dennis B. Johnson, Chestnut & Brooks P.A., 204 North Star Bank Building, 4661 Highway 61, White Bear Lake, Minnesota 55110, appeared on behalf of the Respondents, Margarita Murphy's of Woodbury, Inc., and Wayne Belisle (hereinafter "Margarita Murphy's" and "Mr. Belisle," respectively). The Respondent, Mark Peterson (hereinafter "Mr. Peterson"), appeared pro se. William A. Celebrezze, Horton and Associates, 4930 West 77th Street, Suite 210, Minneapolis, Minnesota 55435-4804, appeared on behalf of Complainant, Brennan H. (hereinafter "Mr. H."). The record closed on this motion on August 8, 1997, at the end of the period during which post-hearing reply briefs, if any, were due.

ORDER

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, IT IS HEREBY ORDERED**:**

1. Mr. H.'s motion to amend the complaint herein is hereby GRANTED;

2. That the motion for a summary disposition dismissing all claims against the Respondent Margarita Murphy's is hereby GRANTED;

3. That the motion for a summary disposition dismissing all claims against the Respondent Mr. Belisle is hereby GRANTED; and

4. That the motion for a summary disposition dismissing all claims based on acts occurring prior to June 5, 1994, is hereby DENIED.

Dated this ____ day of September, 1997.

_____
BRUCE JOHNSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case with respect to Margarita Murphy's and Wayne Belisle and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

MEMORANDUM

I. Prior Proceedings

Mr. H., the Complainant in this matter, filed a discrimination charge against Margarita Murphy's, Messrs. Belisle and Peterson, and Old Mexico, Inc. (hereinafter "Old Mexico") with the Minnesota Department of Human Rights on or about June 5, 1995. In his charge, Mr. H. alleged that the Respondents subjected him to discriminatory treatment with regard to the terms and conditions of his employment and ultimately terminated his employment, all on the basis of his sexual orientation and in violation of Minn. Stat. § 363.03, subd. 1(2)(b) and (c)(1994). Before the Department of Human Rights concluded its investigation, Mr. H. requested that the matter be scheduled for hearing before an administrative law judge pursuant to Minn. Stat. § 363.071, subd. 1a (1994), and a Notice of and Order for Hearing was issued requiring Mr. H. to file a complaint and the Respondents to answer the same. After the complaint and answers were filed in this matter, the parties engaged in discovery. Following discovery, Mr. H. filed a motion for leave to file an amended complaint in which he essentially alleges that Mr. Belisle's operated Old Mexico as his alter ego and is therefore personally liable for the acts complained of. On the other hand, Mr. Belisle and Margarita Murphy's have filed a motion for summary judgment in which they argue that there is no legal basis for Mr. H.'s claims against them, including the allegations that were added in the amended complaint.

II. Contentions of the Parties

Although the Respondents indicated during oral argument that they oppose Mr. H.'s motion to amend the complaint, none of them have raised specific arguments in support of that position. It appears that Mr. H.'s attempt in the amended complaint to establish personal liability on Mr. Belisle's part, on a theory of piercing the corporate veil, is based on evidence that came to light during the course of discovery. Mr. H.'s motion to amend the complaint should therefore be granted.

The bases for the motion of Mr. Belisle and Margarita Murphy's for summary judgment are more complex. Starting with the less complex issues, they claim that certain acts of discrimination which occurred prior to June 5, 1994, cannot be the basis for liability because they are time-barred by the statute of limitations. Second, Mr. Belisle contends that Mr. H. has neither sufficiently alleged nor produced any evidence tending to prove that Mr. Belisle is a person, within the meaning of Minn. Stat. § 353.03, subd. 6(1) (1996), who intentionally aided or abetted a person who engaged in prohibited discriminatory practices. Third, Mr. H.'s employer was Old Mexico. Margarita Murphy's contends that it is a separate and independent legal entity that came into existence after the occurrence of the acts forming the basis for the complaint, and that there is no

theory of corporate successor liability under which Margarita Murphy's can be held liable for any illegal actions of Old Mexico. Finally, Mr. Belisle essentially contends that the material facts that bear on the issue of whether Old Mexico should legally be considered to be his alter ego are uncontroverted, and those facts fail to establish a basis for piercing the corporate veil of Old Mexico in order to impose personal liability on Mr. Belisle for any illegal acts of the corporation.

In response, Mr. H. first argues that under the continuing violation doctrine, the Respondents may be held liable for any discriminatory acts that may have occurred prior to June 5, 1994. With regard to the Respondents' second contention, Mr. H. has not attempted to establish a prima facie showing of Mr. Belisle's liability as an aider and abettor under Minn. Stat. § 353.03, subd. 6(1) (1996). Third, Mr. H. contends that genuine issues of material fact exist as to whether Margarita Murphy's can be held liable for the acts complained of as the successor corporation of Old Mexico. Finally and similarly, Mr. H. contends that there is evidence in the record which, if believed, is sufficient to pierce the corporate veil of Old Mexico and to impose personal liability on Mr. Belisle for any illegal acts of that corporation. In support of their respective positions, both parties have offered affidavits and excerpts from depositions taken during discovery.

III. The Respondents' Burden

Although framed as a motion for summary judgment, the Respondents' motion will be taken as a motion for summary disposition, which is the administrative equivalent of a motion for summary judgment in district court. Like summary judgment, summary disposition is appropriate "where there is no genuine issue as to any material fact." Minn. Rules, pt. 1400.5500(K) (1995); compare Minn. R. Civ. P. 56.03; Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). In considering motions for summary disposition in contested case administrative proceedings, administrative law judges look to the standards developed in district court practice for considering motions for summary judgment. See Minn. Rules, pt. 1400.6600 (1995).

Where the nonmoving party has the burden of persuasion at trial, the moving party's burden on summary judgment is to produce "credible evidence -- using any of the materials specified in Rule 56[.03] -- that would entitle it to a directed verdict if not controverted at trial." Thiele, supra, 425 N.W.2d at 583 n. 1 (quoting Celotex v. Catrett, 477 U.S. 317, 324 (1986)). If the moving party meets that burden, the nonmoving party (here Mr. H.) must show that there is a genuine issue of material fact -- that is, that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will

affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

In order to establish a genuine issue of material fact, the nonmoving party must produce evidence that controverts the evidence produced by the moving party in support of its motion. The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). But the nonmoving party does have the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party. See Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn. App. 1985).

Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. Id. The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, supra, 437 N.W.2d at 715 (citing Celotex, supra, 477 at 324.)

IV. Underlying Facts

For purposes of the pending motion for partial summary disposition, it may be assumed that the specific discriminatory acts that form the basis for Mr. H.'s claims did, in fact, occur as alleged. Based upon the pleadings, affidavits, depositions and other evidence submitted by the parties, and viewing the evidence in the light most favorable to Mr. H., the following are facts about which no genuine dispute exists:

Mr. Belisle and Gerald Landreville incorporated and organized Old Mexico, Inc. in 1978 for the purpose of owning and operating restaurants in the Twin Cities metropolitan area. Both Mr. Belisle and Mr. Landreville were shareholders. Old Mexico eventually established and operated three restaurants -- in Woodbury, Roseville, and downtown Minneapolis. The downtown Minneapolis restaurant was financially unsuccessful and was eventually closed. This left Old Mexico with substantial indebtedness. By 1984

the corporation began experiencing serious financial difficulties, and Mr. Landreville transferred all of his interest in the corporation to Mr. Belisle, who then became the sole shareholder in about May or June of 1984. (Belisle deposition, pp. 10-13)

With the closing of the downtown Minneapolis restaurant and the failure of another enterprise in which Mr. Belisle was involved as general partner, Mr. Belisle came to be at risk of having his business and personal assets seized. To avoid seizure of his assets, Mr. Belisle restructured his holdings in 1987 in order to clear the liens that had accumulated and to keep his various business enterprises in operation. (Belisle deposition, pp. 20-23) As part of the restructuring, Mr. Belisle liquidated a bank account with a balance of $750,000 and used $400,000 from a mortgage on his house to pay some of these obligations, which included obligations of Old Mexico. Mr. Belisle infused about a half million dollars of his own funds into Old Mexico. (Belisle deposition, p. 34) He then transferred many of his business assets, including his shares in Old Mexico, Inc., to a new corporation, Eurbco, Inc., whose shares were held by Lloyd Eurban. Eurbco also received title to the Woodbury premises of Old Mexico at this time. Eurban personally guaranteed a bank loan of two million dollars, in addition to pledging the assets of Eurbco as collateral. The loan proceeds were used to pay off the remaining liens and other debt. There was an understanding with the bank that if Mr. Belisle remained current on his loan payments for a year, Mr. Eurban's personal guarantee would be released, and the shares of Eurbco would be returned to Mr. Belisle. Mr. Belisle met the terms of the agreement and received all the shares of Eurbco (including its 100 percent interest in Old Mexico, Inc.) in 1988. (Belisle deposition, pp. 20-23, 33-35, 43, and 45) The outstanding obligations of Eurbco included the remaining portion of the two million dollar bank loan. In 1991, the Roseville restaurant was sold with all the proceeds of the sale going to the bank to pay off indebtedness related to that operation. (Belisle deposition, p. 28)

Mr. Belisle took no part in the day-to-day operation of Old Mexico. Rather, he hired a general manager to run the restaurant. (Belisle deposition, pp. 12, 25, and 26) Mr. Belisle paid himself a salary and received the use of a leased vehicle. Other than the salary and vehicle, Belisle did not take any funds, profits or dividends out of the corporation. (Belisle deposition, pp. 28, 29, and 37) No formal board meetings were conducted after Belisle became the sole shareholder. But corporate formalities, such as board meetings, were observed when they were needed to conduct transactions with third parties, such as lenders. (Belisle deposition, pp. 16, 18, and 35) Mr. Belisle believed that minutes of corporate meetings and other similar corporate documents had been prepared but was unable to locate them. (Belisle deposition, p. 18) Old Mexico filed a corporate tax return every year. (Affidavit of Becky L. Erickson) Because of Eurbco’s large indebtedness (Old Mexico’s shares having been used as collateral for those loans) and the relatively small amount of revenue being generated by Old Mexico, the business was at risk of being foreclosed upon by

1994. (Belisle deposition, p. 45) In December, 1994, Old Mexico ceased doing business and its creditors compromised on the corporation's debts for a fraction of the amount actually owed them. (Belisle deposition, pp. 58-59) The restaurant closed its doors in December of 1994. (Belisle deposition, pp. 51-51; Affidavit of Alan B. Demmer)

Mr. H. began work for Old Mexico bussing tables in December, 1987. He was promoted to server in 1992. (H. deposition, p. 6) He alleges that the following events occurred while he was employed there: that his supervisor, Mark Peterson, made derogatory comments regarding H.'s sexual orientation in December, 1993; April, 1994; and August, 1994; that when he returned from a leave and solicited information from other coworkers about available work, Mr. Peterson expressed a desire to terminate his employment at Old Mexico; that on December 5, 1994, he met with the general manager of the restaurant and complained of Mr. Peterson's discriminatory actions on the basis of sexual orientation; and that on December 7, 1994, he was terminated by the general manager as being "high maintenance."[1] (H. deposition) The only direct contact Mr. H. ever had with Mr. Belisle was an innocuous and casual conversation in the summer of 1994. (H. deposition, pp. 9-12) The record contains no evidence tending to prove that Mr. Belisle had personal knowledge of any of the discriminatory occurrences that Mr. H. alleges happened to him while in Old Mexico's employ. Mr. H. has never been employed by Margarita Murphy's. (Affidavit of Alan B. Demmer)

In 1994, Mr. Belisle had engaged in discussions with lenders to capitalize a new restaurant operation at the Old Mexico location in Woodbury. The lenders believed that a sports bar concept similar to Champps (a successful sports bar chain) would be profitable in the Woodbury location. Before lending any money, however, the bank required that several conditions be met. One such condition was that the operation of Old Mexico must cease and none of its obligations carry over into the new operation. Second, Belisle needed to bring in restaurant management that the lender trusted -- namely, Alden Landreville, who was involved in operating the successful Champps restaurant chain. (Belisle deposition, pp. 55-59)

Margarita Murphy's was formed on December 1, 1994. The corporation had two shareholders, Belisle with 25% of the shares and Alden Landreville with 75% of the shares.[2] Belisle capitalized the corporation with the proceeds of the sale of Belisle's interest in Champps and a loan using his shares of Margarita Murphy's as collateral.[3] Landreville provided the management team modeled on the Champps business plan. No debts incurred by Old Mexico were assumed by Margarita Murphy's. As sole shareholder and director of Eurbco, Mr. Belisle released Old Mexico from its lease of the Woodbury premises. Then on January 1, 1995, Eurbco leased the same premises to Margarita Murphy's, which made substantial renovations on the property. (Belisle deposition, pp. 55-59; Affidavit of Alan B. Demmer) In January of 1995, Margarita Murphy's conducted

a hiring process to staff the new restaurant. Anyone who worked for Old Mexico and wanted to work for Margarita Murphy's was required to submit an application and be interviewed. (Peterson deposition, pp. 47-53; H. deposition, p.65)

On June 5, 1995, Complainant filed a charge with the Minnesota Department of Human Rights. (Affidavit of William A. Celebrezze, Exhibit 6) The Department referred the charge to the Office of Administrative Hearings because no determination of probable cause had been made within 180 days. This matter ensued.

V. Statute of Limitations Defense

Margarita Murphy's and Mr. Belisle seek a partial summary disposition dismissing any of Mr. H.'s claims that are based on alleged acts of discrimination occurring prior to June 5, 1994. (Amended Complaint, paragraph 12) Mr. H. first filed charges of discrimination with the Minnesota Department of Human Rights on June 5, 1995. (Affidavit of William A. Celebrezze, Exhibit 6). Minn. Stat. § 363,06, subd. 3 (1996) provides in part that:

> A claim of an unfair discriminatory practice must be brought as a civil action pursuant to section 363.14, subdivision 1, clause (a), filed in a charge with a local commission pursuant to section 363.116, or filed in a charge with the commissioner within one year after the occurrence of the practice. [Emphasis supplied.]

Mr. Belisle and Margarita Murphy's argue that application of the plain language of the statute to the facts of this case require dismissal of any claims based on occurrences that happened prior to June 5, 1994. Mr. H. contends, however, that the statute of limitations is tolled in this matter through operation of the "continuing violation" doctrine. In reply, the Respondents argue that the continuing violation doctrine is inapplicable in this matter.

In Hubbard v. United Press International, Inc., 330 N.W.2d 428, 441 n. 11 (Minn. 1983), the Minnesota Supreme Court offered the following discussion of the doctrine:

> The continuing violation doctrine has been applied by courts to toll the statute of limitations in employment discrimination actions when the discriminatory acts of an employer over a period of time indicate a systematic repetition of the same policy and constitute a sufficiently integrated pattern, in effect, a single discriminatory act.

Based on the Minnesota Supreme Court's description, the question of whether the continuing violation doctrine applies in a particular case is a mixed question of law and fact, and there is still a genuine dispute over material facts pertaining

to the application of that doctrine here. The Respondents' statute of limitations defense is therefore not susceptible of adjudication by summary disposition.

VI. Aiding and Abetting Claim Against Mr. Belisle

Minn. Stat. § 363.03, subd. 6(1) (1996) provides:

> Subd. 6. **Aiding and abetting and obstruction**. It is an unfair discriminatory practice for any person:
>
> (1) Intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter;

Mr. H. claims that Mr. Belisle's conduct during the course of Mr. H.'s employment constitutes aiding and abetting unlawful discrimination within the meaning of that statute. (Amended Complaint, paragraph 25) As previously noted, summary disposition may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Carlisle v. City of Minneapolis, supra, 437 N.W.2d at 715. Here, proof that Mr. Belisle possessed an intent to aid and abet in discriminatory acts aimed at Mr. H. is an essential element of Mr. H.'s claim. Despite the substantial discovery efforts that have been put forward by all of the parties, Mr. H. has been unable to come forward with any evidence from which a discriminatory intent on Mr. Belisle's part can be shown or inferred. Mr. H.'s deposition testimony established that the only contact he ever had with Mr. Belisle was a single casual conversation in the summer 1994 in which nothing of substance was discussed. (H. deposition, pp. 9-11) Mr. H. did not use that opportunity to advise Mr. Belisle of the discriminatory acts which Mr. H. alleges had already occurred, nor did he ever complain to Mr. Belisle about discriminatory acts. (H. deposition, p 12) Mr. H. had no reason to believe that Mr. Belisle had personal knowledge of any discriminatory acts that may have been committed by Old Mexico employees (id.), nor has Mr. H. adduced other evidence of such knowledge on Mr. Belisle's part. In view of this failure to produce any evidence to support an essential element of Mr. H.'s claim that Mr. Belisle aided and abetted discrimination, Mr. Belisle is entitled to a summary disposition dismissing the claim against him based on Minn. Stat. § 363.03, subd. 6(1) (1996).

VII. Margarita Murphy's Liability as a Corporate Successor

A. Absence of Asset Transfer

Margarita Murphy's seeks a summary disposition holding that as a corporation separate and distinct from Old Mexico, it bears no liability for the acts

complained of and is not a proper party to this proceeding. There is no dispute over the fact that Mr. H.'s employer was Old Mexico, and his employment with Old Mexico was terminated before Margarita Murphy's began hiring staff or conducting business. Margarita Murphy's, therefore, can only be a proper party in this proceeding and potentially liable for the acts complained if liability can be predicated on some theory of corporate successor liability. The traditional dimensions of the theory of corporate successor liability were considered by the Minnesota Supreme Court in J. F. Anderson Lumber Co. v. Myers, 296 Minn. 33, 37-38, 206 N.W.2d 365, 368-69 (Minn. 1973), where it described the governing principles as follows:

> Generally where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the [296 MINN 38] purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts. [Citations omitted.]

As expressed above, in order for a corporation to be held liable for the debts of another corporation as a successor, a two-part test must be met. First, one corporation must sell or otherwise transfer "all of its assets to another corporation." Second, one of the four specified circumstances must also exist. With regard to the first prerequisite, there is no authority in Minnesota law for invoking the theory of corporate successor liability where no sale or transfer of a corporation's assets has occurred.[4] Here, there is no evidence that Old Mexico transferred any of its assets to Margarita Murphy's, much less all, or substantially all, of its assets.[5]

B. Continuation Theory of Successor Liability

Even if a transfer of assets is not required or could be shown, Mr. H. must show that one or more of the four circumstances described in Anderson Lumber Co., supra, exists in order to impose liability on Margarita Murphy's for the acts of discrimination allegedly committed by employees of Old Mexico. There is no evidence of an agreement, express or implied, on the part of Margarita Murphy's to assume the liabilities of Old Mexico, and there is no evidence that Margarita Murphy's was organized for the fraudulent purpose of escaping liability for Old Mexico's debts.[6] Mr. H., however, argues that this matter involves a situation "where the purchasing corporation is merely a continuation of the selling corporation." 206 N.W.2d at 368-69. Alternatively, he argues that the winding up of Old Mexico's affairs and subsequent start-up of Margarita Murphy's constituted a de facto merger.

Although the Minnesota Supreme Court has not fashioned a formal test for determining when the continuation theory of corporate successor liability may be applied, it has consistently indicated that the theory should be viewed narrowly:

> Under the traditional rule mere continuation "refers principally to a 'reorganization' of the original corporation" under federal bankruptcy law or through state statutory devices. J.F. Anderson, 296 Minn. at 38, 206 N.W.2d at 369. This court held that "continuity of business, name, and management alone, is not, we think, sufficient basis for holding a transferee liable for the debts of the transferor." Id. If there is no continuation of the corporate entity -- shareholders, stock, and directors -- the successor corporation is not liable.

Niccum v. Hydra Tool Corp., supra, 438 N.W.2d at 99. In Soo Line R. Co. v. B.J. Carney & Co., 797 F. Supp. 1472, 1483 (D. Minn. 1992), the court indicated that some of the factors suggesting mere continuation include an identity of officers and shareholders, continuity of control, and the adequacy of consideration in the transfer of assets. In Carstedt v. Grindeland, 406 N.W.2d 39, 40 (Minn. App. 1987), the Minnesota Court of Appeals affirmed a summary judgment denying corporate successor liability under the continuation theory. Summary judgment was deemed appropriate despite a record that established the following connections between the two corporations:

> Carstedt's first claim was for breach of contract. He alleged that CPI was the same business and a mere continuation of CPS because CPI manufactured and sold decurlers under the same trademark, used substantially the same trade name, used the same business assets, and employed substantially the same persons as CPS. He alleged neither Steven Grindeland nor CPI paid any compensation to Gordon Grindeland or CPS for use of the "Automagic" trademark, the "Clear Print" trade name, or the good will associated with those business properties and that no compensation was paid for other business assets.

Here, many of the connections that were present in Carstedt are absent. There is no continuation of the stock of Old Mexico. There is a non-identity of shareholdings, except to the limited extent that the sole shareholder in Old Mexico became a minority shareholder in Margarita Murphy's. There is also a non-identity of directors. There was no continuity of control or any transfer of assets between the two corporations. Margarita Murphy's did not use substantially the same trade name or the same business assets as Old Mexico.[7] Although Margarita Murphy's may have employed some of the same persons employed by Old Mexico, that was simply a matter of Margarita Murphy's using the labor pool that Old Mexico had created. Old Mexico employees were required to apply for employment anew and be re-interviewed.

In view of all of this, the Administrative Law Judge concludes, as the Minnesota Court of Appeals concluded in Carstedt, that there is insufficient evidence in the record to support a conclusion that Margarita Murphy's was merely a continuation of the business of Old Mexico.

C. De Facto Merger Theory of Successor Liability

Finally, Mr. H. asserts that there was a de facto merger between Old Mexico and Margarita Murphy's which supports holding the latter liable for any award against Old Mexico. Minnesota's appellate courts apparently have not yet had an opportunity to consider the doctrine of de facto merger, but that doctrine had been addressed from time to time in federal courts. The elements of de facto merger are set out in Keller v. Clark Equipment Company, 715 F.2d 1280, 1291 (8th Cir. 1983):

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
>
> (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

The same facts that make the "mere continuation of business" theory inapplicable also operate to defeat a claim of a de facto merger here. In January of 1995, the business enterprise that had been Old Mexico was replaced by an entirely new business enterprise. The menu, management, and general business operation all changed. The location of the business enterprise was the same, but that location was rented from a third corporation. There was no purchase of Old Mexico stock or transfer of assets from Old Mexico to Margarita Murphy's. The sole shareholder of Old Mexico became a minority shareholder of Margarita Murphy's. There was a cessation of Old Mexico's business operations, but the corporation remained in existence. Margarita Murphy's assumed none of Old Mexico's liabilities and there was no uninterrupted continuation of Old

Mexico's normal business operations. In short, the undisputed facts fail to establish the existence of a de facto merger, as a matter of law.

VIII. Piercing the Corporate Veil

Finally, Mr. H. seeks to pierce Old Mexico's corporate veil and hold Mr. Belisle personally liable for any award against Old Mexico. In appropriate circumstances, an administrative law judge may pierce the corporate veil and hold a shareholder liable for the discriminatory practices of a corporation and its employees. See, e.g., State by McClure v. Sports and Health Club, 370 N.W.2d 844 (Minn. 1985)

The standard for determining when a corporation should be treated as the alter ego of one of its shareholders was set out in Victoria Elevator Co. v. Meriden Grain Co. Inc., 283 N.W.2d 509 (Minn. 1979). There, the Minnesota Supreme Court established the following test:

> Although we have previously relied on findings that the corporate form was used to accomplish a fraudulent purpose to impose personal liability, we have never explicitly held that fraud is a necessary element. As noted recently by the Fourth Circuit Court of Appeals, fraud may often be cited as a ground for disregarding the corporate entity, but it is not the only ground for such a finding. Courts have also relied upon the "alter ego" or "instrumentality" theory to impose liability on an individual shareholder. [Citation omitted] In their application of this theory, "courts are concerned with reality and not form, with how the corporation operated and the individual defendant's relationship to that operation." [Citation omitted] Factors considered significant in the determination include: insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely facade for individual dealings. [Citation omitted]
>
> Disregard of the corporate entity requires not only that a number of these factors be present, but also that there be an element of injustice or fundamental unfairness. [Citation omitted] Where the above factors are present, to allow an individual to escape liability because he does his business under a corporate form is to allow him an advantage he does not deserve. Doing business in a corporate form in order to limit individual liability is not wrong; it is, in fact, one purpose for incorporating. But where the

> formalities of corporate existence are disregarded by one seeking to use it, corporate existence cannot be allowed to shield the individual from liability for damages incurred by those dealing with the corporation.

Victoria Elevator, at 512.

As indicated above, determining whether to pierce a corporate veil and hold a shareholder liable for liabilities of his or her corporation involves a two-part inquiry. The objective in the first stage of inquiry is to determine whether the shareholder has treated the corporation as an alter ego. It involves analyzing the relative presence or absence of eight factors which shed light on the extent to which a shareholder has blurred the distinction between his or her own affairs and those of the corporation. The second stage involves an inquiry into whether a shareholder's disregard of the corporate form has resulted in "an element of injustice or fundamental unfairness." Id.

The facts which are material to an analysis under Victoria Elevator are not genuinely in dispute here. What remains is application of the law to the facts. In other words, the issue of whether Mr. Belisle is personally liable for the acts complained of is susceptible of summary disposition.

A. Sufficiency of Capitalization

The first factor which Victoria Elevator indicates is germane to determining whether Mr. Belisle disregarded the corporate form of Old Mexico is whether there was "insufficient capitalization for purposes of corporate undertaking." Id. Mr. H. contends that a triable issue exists as to whether the capitalization of Old Mexico was sufficient. Undisputed evidence indicates, however, that the corporation's capitalization was sufficient to keep Old Mexico in business for its first six years –- from 1978 until 1984 when there was an unsuccessful attempt to open a downtown Minneapolis restaurant. Thereafter, in 1987 Mr. Belisle restructured Old Mexico's finances, pledging some of his own assets as collateral for Old Mexico's indebtedness and infusing about a half million dollars of his own funds in order to keep the corporation in business. Finally, in 1994 the financial pressures became too severe, and Old Mexico went out of business. With regard to capitalization, the facts of this case are indistinguishable from those in Snyder Electric Co. v. Fleming, 305 N.W.2d 863 (Minn. 1981) and Almac, Inc. v. JRH Development, Inc., 391 N.W.2d 919 (Minn. App. 1986), rev. den, (Minn. Oct. 17, 1986). In the latter case, in reversing the trial court's determination of insufficient capitalization, the Minnesota Court of Appeals observed:

> The Snyder case is not unlike this one. In Snyder, the corporation, a sheet metal company, had stated capital at all times of $5000. Id. at 866, 868. The corporation never paid dividends; earnings were retained to provide operating capital. Id. at 866.

> The sole shareholder loaned additional capital to the closely held corporation. The corporation prospered at first, then began showing a loss and finally became insolvent. Id. Creditors of the corporation attempted to hold the sole shareholder personally liable. Id. The trial court would not allow the piercing of the corporate veil, and the supreme court affirmed that part of the trial court's decision. See id. at 869. The supreme court found that the corporation was not undercapitalized because the corporation's "total equity (stated capital plus shareholder loans plus retained earnings) kept pace with corporate liabilities until the drastic losses started * * *." Id. at 868. That is true of JRH Development, Inc. as well. The trial court stated in Snyder that " '[a]ny business which fails can probably be said to have been undercapitalized.' " Id. The same observation could be made in this case.

Almac, supra, 391 N.W.2d at 923. The circumstances surrounding the capitalization of Old Mexico are essentially indistinguishable from the circumstances that were considered in Almac.

B. Observation of Corporate Formalities, Absence of Corporate Records and Inactivity of Directors and Officers

Three closely-related factors used to determine whether a corporation is the alter ego of a shareholder are the extent to which corporate formalities have been observed, whether there is an absence of corporate records, and whether directors and officers are inactive in corporate affairs.

After Mr. Belisle became the sole shareholder in Old Mexico, he became the only director of the corporation, and he did not conduct formal board meetings. The only times when corporate formalities, such as board meetings, were observed was when they were required to conduct transactions with third parties, such as lenders. Mr. Belisle was unable to locate minutes of shareholder and director meetings and other corporate records. Old Mexico did, however. file corporate tax returns for each year of its existence. In short, the record establishes that Mr. Belisle was far from meticulous in the way in which he observed corporate formalities. The question then turns to the weight Mr. Belisle's inattention to corporate formalities should be given in determining whether he treated Old Mexico as his alter ego. Again, the conclusions reached in Almac, supra, are helpful. In addressing evidence of inattention to corporate formalities in similar circumstances, the Minnesota Court of Appeals observed at 391 N.W.2d at 923:

> The fact the board of directors never met does not mean the directors are not abiding by corporate formalities. See Minn. Stat. § 302A.231, subd. 1 (1984) (board of directors may meet from time to time, as required by the corporation's

> bylaws). The fact appellant acted without benefit of sanction from the corporation's directors is not determinative, especially in the case involving a closely-held corporation where the only directors are a husband and wife. See Snyder, 305 N.W.2d at 868 (directors in a closely-held corporation may be passive).

Mr. Belisle testified that minutes of meetings and other corporate documents were prepared but that he has been unable to locate them.[8] Finally, the evidence establishes that Mr. Belisle has been extremely active in the affairs of the corporation, and there have been no other officers or board members since he became Old Mexico's sole shareholder. The factor of inactivity by other officers or board members is inapplicable here.

In summary, Mr. Belisle actively functioned as Old Mexico's sole director and officer. On the other hand, corporate formalities were not strictly observed, and it must be assumed that corporate records were poorly kept. However, since Old Mexico was a closely-held corporation with a single shareholder, inattention to corporate formalities and record keeping is not determinative of whether Mr. Belisle treated Old Mexico as his alter ego. The degree of his inattention to formality and record keeping is simply a factor to be weighed in the balance with the other factors described in Victoria Elevator.

C. Insolvency of Old Mexico and Nonpayment of Dividends

Two other factors mentioned by the Minnesota Supreme Court in Victoria Elevator are whether the corporation was insolvent at the time of the acts in question and whether it failed to pay dividends. The two factors are related here.

There is no question that Old Mexico was insolvent in 1994. A corporation's insolvency, however, only acquires importance in the analysis when the corporation has induced someone to do some act with regard to the corporation that would not have been done if the insolvency was known. Snyder Elec. Co. v. Fleming, 305 N.W.2d 863, 868 (Minn. 1981). There is no inducement involved in this matter. The importance of insolvency where no such inducement can be shown was discussed in Association of Mill and Elevator Mutual Ins. Co. v. Barzen Intern., Inc., 553 N.W.2d 446 (Minn. App. 1996):

> The presence of insolvency before a corporate closing, however, is too common to give the factor much weight in this context. See, e.g., Snyder Elec. Co. v. Fleming, 305 N.W.2d 863, 867 (Minn. 1981) (corporation became insolvent and closed two years later); B

> & S Rigging & Erection, Inc. v. Wydella, 353 N.W.2d 163, 166 (Minn. App. 1984) (insolvency for two months before ceasing operations).

Barzen, at 450.

Here, the evidence establishes that Old Mexico was insolvent for most of its corporate existence but rather than using that insolvency as a trap for the unwary, Mr. Belisle dealt with it until December of 1994 by pouring more of his own money into the business. Mr. H. was never unfairly induced to rely on an appearance of Old Mexico's solvency; he never missed a paycheck because of the corporation's insolvency. If the mere fact of insolvency were a significant factor in determining whether a corporation was a shareholder's alter ego, then the shareholders of any failed or failing closely-held corporation would routinely be liable for corporate debts, and doing business in the corporate form would become meaningless. In short, Old Mexico's insolvency does not lend support here for the proposition that Mr. Belisle treated Old Mexico as his alter ego.

The evidence also establishes that Old Mexico never paid a dividend on its stock. But as the Minnesota Supreme Court observed in Snyder Electric Co. v. Fleming, 305 N.W.2d 863, 868 (Minn. 1981):

> Dividends were never paid, but this should be no complaint where the sole shareholder put all earnings back into the business.

Moreover, it would likely have been viewed as an injustice to, or even as a fraud upon, creditors if Mr. Belisle had been paying himself dividends while the corporation was insolvent. When a corporation becomes insolvent, its directors and officers become fiduciaries. "As fiduciaries, they cannot by reason of their special position treat themselves to a preference over other creditors." Snyder, supra, 305 N.W.2d at 869.

D. Siphoning of Funds by Dominant Shareholder

Evidence that a dominant shareholder has siphoned funds out of a corporation should weigh heavily in establishing that the shareholder treated the corporation as an alter ego. But there is no evidence of that having happened here. Although Mr. Belisle received a salary from Old Mexico and the use of a leased automobile, there is no evidence that such compensation was excessive or unrelated to the value of the services he was providing the corporation. The corporation paid no dividends to Mr. Belisle, and there is no evidence that he ever withdrew funds from the corporate checking account for his own benefit or for the benefit of other entities he controlled.[9] On the other hand, the record on this motion does establish that rather than siphoning funds out of Old Mexico, Mr. Belisle infused operating capital into the corporation on a number of occasions. When his holdings, including Old Mexico, were reorganized in 1987, Belisle kept

the business functioning by incurring substantial debt and arranging for the personal guarantee of that debt by another. These cash infusions and guarantees all inured to the benefit of Old Mexico's creditors.

Rather than siphoning cash, Mr. H. suggests that Mr. Belisle may have appropriated assets of Old Mexico -– first, by allowing Margarita Murphy's to acquire Old Mexico's "good will" and, second, by having Eurbco shift the leasehold interest in the restaurant premises from Old Mexico to Margarita Murphy's. Good will is monetary expression of a business' value as a going concern. In late December of 1994, Old Mexico was not only insolvent, it was no longer even a going concern. Old Mexico had wound up its affairs, liquidated its assets, and paid its creditors substantially less than full payment on the debts it to them. There is no good will value that could have been transferred, either to Belisle or to Margarita Murphy's, after Old Mexico ceased doing business.[10]

Mr. H. also suggests that Eurbco's release of Old Mexico from its lease and subsequent lease of the premises to Margarita Murphy's amounted to shifting assets from Old Mexico to Margarita Murphy's. But this argument ignores the fact that in December of 1994 Old Mexico was going out of business and would be unable to pay the rent. Since Old Mexico no longer had a sustainable interest in the property, the lease in question was no longer an asset of Old Mexico but a liability. Margarita Murphy's would be able to pay rent, and its lease of the premises relieved Old Mexico of a liability.

E. Using the Corporation as a Facade for Individual Dealings

Using a corporation as merely a facade for individual dealings is the final factor to be considered in the first stage of the Victoria Elevator analysis. The record on this motion fails to establish that Mr. Belisle used the corporation in any fashion inconsistent with its business purpose or that he personally intruded inappropriately into the day-to-day affairs of the corporation. He hired managers to operate the business for him. When arranging financial transactions with lenders, board resolutions were made. Unlike Walden Brothers Lumber, Inc. v. Wiggin, 408 N.W.2d 675 (Minn. App. 1987), there is no evidence here that Mr. Belisle transferred money freely between his corporations and his personal accounts. The record is devoid of evidence that Old Mexico was a mere facade for Belisle's personal dealings.

On balance, the factors set out in Victoria Elevator tending to show a blurring of the distinction between Mr. Belisle's affairs and Old Mexico's are all formal factors -- e.g., an inattention on Mr. Belisle's part to corporate formalities and records. The factors relating to substance –- money and assets -– all tend to suggest a lack of blurring of that distinction. In summary, the record on this motion supports a finding that Mr. Belisle did not treat Old Mexico as his alter ego and that the first prong of the Victoria Elevator test has not been met here.

F. Lack of Injustice or Fundamental Unfairness

In addition to presenting evidence of the factors in the first prong of the Victoria Elevator test, a party seeking to pierce a corporate veil must also demonstrate that the second prong of that test has been met by showing that "an element of injustice or fundamental unfairness" is present. Victoria Elevator, at 512. Mr. H. argues that the second prong is less important than the first and "has not been much of an impediment . . . ." (Complainant's Supplemental Memorandum, at 1.) This view is not in accord, however, with the views of Minnesota' appellate courts. In Snyder, supra, 305 N.W.2d at 868 n. 1, the Minnesota Supreme Court stated:

> Disregard of the corporate entity requires not only that a number of these factors be present, but also that there be an element of injustice or fundamental unfairness.

More recently, in Miller & Schroeder, Inc. v. Gearman, 413 N.W.2d 194, 196 (Minn. App. 1987), the Minnesota Court of Appeals confirmed the necessity of meeting the second prong of the test:

> However, there is a second, and more important prong to the test. In order to justify piercing the corporate veil the court must find "an element of injustice or fundamental unfairness." Victoria Elevator Co., 283 N.W.2d at 512. Usually, this means that the corporation "has been operated as a constructive fraud or in an unjust manner." West Concord Conservation Club, Inc. v. Chilson, 306 N.W.2d 893, 898 n. 3 (Minn. 1981). Common law fraud is not required. Id. Generally, one is piercing the corporate veil on behalf of a creditor dealing with the corporation because it is unfair or unjust not to.

Mr. H. relies upon Chergosky v. Crosstown Bell, Inc., 454 N.W.2d 654, (Minn. App. 1990), to support his contention that the second prong of the Victoria Elevator test is less important than the factors to be considered in the first prong. After evaluating the factors in the first prong and determining that the shareholder treated the corporation as his alter ego, the Court of Appeals arrived at the following specific holding regarding the second prong:

> Teien also operated Crosstown in an unjust manner. The trial court said "[a]fter this history of blurred distinctions between Teien and the corporation, it is not fair to allow Teien to now use the corporate structure as a shield against claims Crosstown cannot satisfy." Because Northwestern Bell purchased the property from Crosstown, Crosstown was required to repay the Chergoskys under the contract for deed. Yet, Crosstown never could have done this because it never had the assets to do so. It would be unfair to

> allow Teien, who used Crosstown as an alter-ego corporation, to shield himself from liability under the contract for deed. Thus, the trial court's decision to pierce the corporate veil and hold both Teien and Crosstown liable to the Chergoskys under the contract for deed is affirmed.

Chergosky, 454 N.W.2d at 658.

Mr. H.'s main contention of injustice and fundamental unfairness is that Old Mexico, which was Mr. H.'s employer, is no longer in business and has no assets so it would be unable to pay an award if Mr. H. prevails on the merits.[11] It is neither unjust or fundamentally unfair for a person to organize a corporation for the purpose of insulating himself from the fixed and contingent liabilities that may arise from operating a business. That is one of the primary purposes for which corporate law exists. As in Almac, this "corporation was formed for bona fide purposes and fulfilled those purposes while it existed," and "[t]he transaction between the parties was conducted openly in the name of . . . [the] corporation." 391 N.W.2d at 924. Also as with the shareholder in Almac, Mr. Belisle "pumped his own money into the corporation to keep it afloat." Id. at 923. It was these infusions of capital that kept Old Mexico operating and Mr. H. employed for seven years. In short, Mr. H. has also failed to meet the second part of the Victoria Elevator test by showing that he has been unjustly disadvantaged by the way in which Mr. Belisle operated the corporation.

In view of the foregoing, no legal bases remain for imposing liability for the acts complained of on either Margarita Murphy's or Mr. Belisle, and they are entitled to a summary disposition dismissing all claims against them in this proceeding.

B.H.J.

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[1] A genuine dispute still exists over the truth of Mr. H.'s version of these facts. Since, however, the issues raised by this motion for partial summary disposition do not pertain to whether violations of the Minnesota Human Rights Act occurred, but rather to the legal bases for holding certain Respondents liable if such violations did occur, the Administrative Law Judge will assume that Mr. H.'s allegations are true only for purposes of this motion.

[2] The affidavit of Alan B. Demmer suggests that there may have been a third, unidentified shareholder.

[3] The record contains no evidence of any transfer of assets from Old Mexico to Margarita Murphy's.

[4] The test articulated in J. F. Anderson Lumber Co. v. Myers, supra, 206 N.W.2d at 368-69, expressly states that there must be a sale or transfer of all of the transferring corporation's assets. In State Bank of Young America v. Vidmar Iron Works, Inc., 292 N.W.2d 244 (Minn. 1980), the issue of corporate successor liability also arose in a situation where all of a

corporation's assets were sold to another corporation. See also, Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989), and Carstedt v. Grindeland, 406 N.W.2d 39 (Minn. App. 1987). The only apparent deviation from this requirement seems to be Butler Manufacturing Co. v. Miranowski, 390 N.W.2d 380 (Minn. App. 1986), which involved a sale of "substantially all" of a corporation's assets.

[5] In a Supplemental Memorandum of law, counsel for Mr. H. suggested that Margarita Murphy's had acquired "good will" from Old Mexico. First, there is no evidence of an assignment, either express or implied, of good will from Old Mexico to Margarita Murphy's. Second, at the time Old Mexico ceased doing business, it was insolvent. Rather than initiating bankruptcy proceedings, Old Mexico compromised its known liabilities for a fraction of the amounts owed. (Belisle deposition, pp. 58-59) This negates the idea that in December of 1994 Old Mexico had any "good will" to transfer.

[6] As previously indicated, in December of 1994 the claims of Old Mexico's creditors were compromised, albeit at a fraction of their face amount. The potential liability represented by this proceeding was unknown prior to June 7, 1995.

[7] The evidence indicates that three to four hundred thousand dollars were spent on building rennovations and new trade fixtures for Margarita Murphy's. (Belisle deposition, p. 51)

[8] An issue of fact may therefore exist as to the extent to which corporate records were maintained. For purposes of this motion, the Administrative Law Judge must assume that corporate records were poorly maintained.

[9] See Exhibits 1 and 2 to the Affidavit of Becky L. Erickson.

[10] Mr. H. suggests that the suitability of the Woodbury location as a restaurant location constitutes good will. Since the premises were owned by Eurbco, not Old Mexico, any such good will inured to the benefit of the former rather than of the latter corporation.

[11] In his Supplemental Memorandum of Law, Mr. H. also argues tht Mr. Belisle unjustly transferred Old Mexico's good will to Margarita Murphy's and thereby deprived creditors of recourse to the value of that asset. As noted in Part VII-D, supra, when Old Mexico, then insolvent, ceased to be a going concern, it ceased to have any good will value under any accepted method of appraisal. Moreover, there is no evidence of an assignment or transfer of good will.